

Porretta v Thein Maung
2007 NY Slip Op 31189(U)
May 11, 2007
Supreme Court, Richmond County
Docket Number: 0102656/2005
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

PART DCM 3

Index No.: 102656/05

Motion No.: 2

MILDRED I. PORRETTA,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**THEIN MAUNG, M.D. and ST. VINCENT'S HOSPITAL
STATEN ISLAND,**

Defendants

The following items were considered in the review of this motion for discovery/Bill of Particulars

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Papers	3
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants move this court for an order pursuant to CPLR § 3042 precluding the plaintiff from giving evidence at the time of trial as to the matters contained in the particulars demanded by the defendants; or in the alternative, striking the bill of particulars and directing the plaintiff to serve an amended or further bill of particulars responsive to the demands served by the defendants. The plaintiff opposes this motion.

It is black letter law that the purpose of a Bill of Particulars is to amplify the pleadings, limit the proof and prevent surprise at trial (*Paldino v. E. J. Korvettes, Inc.* 65 AD2d 617 [2d Dept 1983]; *Moore v. Chrysler Corp.* 100 AD2d 955 [2d Dept 1984]; *Harris v. Ariel Trans. Corp.* 37 AD3d 308 [1st Dept 2007]). The Bill of Particulars enables at risk parties to obtain a more detailed picture of the claims or defenses confronting them and is improper if it contains statements of acts of alleged malpractice that are overly broad that it is impossible to conceive any acts of malpractice that would not be included in them (*Castellano v. Norwegian Christian Home and Health Ctr. Inc.*, 24 AD3d 490 [2d Dept 2005]).

Here, the defendants are objecting to the following language alleging that it is over broad and vague:

“In failing to comply with and abide by all applicable laws, rules, regulations, statutes, and ordinances including the applicable sections of the public health law and the education law; in failing to prevent the occurrence complained of herein; in causing the injuries complained of herein; in failing to exercise the degree of skill, care and diligence to which this plaintiff was entitled; in failing to properly and/or adequately carry out the orders of the attending physician; in failing to review and evaluate staff, nurses and physicians at indicated intervals.”

The plaintiff argues that this language is proper for a Bill of Particulars, however the court disagrees. This language is clearly over broad and vague and is not proper for a Bill of Particulars. The plaintiff has not particularized what laws, rules, regulations, statutes, and ordinances of which sections of the Public Health Law and Education Law were allegedly violated. Also, the language alleging that plaintiff failed to prevent the occurrence, caused the injuries, failed to exercise the degree of skill that the plaintiff was entitled, failed to properly and adequately carry out the orders of the attending, and failed to review and evaluate staff, nurses, and physicians and indicated levels is vague and over broad.

Furthermore, a review of the complaint and the Bill of Particulars allege that there is a cause of action for “*informed consent*.” The plaintiff herein alleges that she was caused to fall due to the defendants’ failure to supervise her. New York Public Health Law § 2805-d(2) states that the right of action to recover for medical, dental, or podiatric malpractice based on lack of informed consent is limited to those cases involving either: (a) non-emergency treatments, procedure or surgery; or (b) a diagnostic procedure which involves invasion or disruption of the integrity of the body as a result of the procedure. Here, the plaintiff alleges she fell due to inadequate supervision, therefore, the cause of action for informed consent is improper.

Accordingly, it is hereby:

ORDERED, that the plaintiff’s bill of particulars is stricken and the plaintiff is to prepare a further Bill of Particulars which, with specificity, particularizes the facts surrounding the cause of action; and it is further

ORDERED, that the cause of action for lack of informed consent is hereby stricken; and it is further

ORDERED, that all parties return to DCM 3 at 9:30 a.m. on **August 22, 2007** for a compliance conference.

ENTER,

DATED: May 11, 2007

Joseph J. Maltese
Justice of the Supreme Court